

Civil Revision Application No.1/2002

1. Shri Shripad Mahadev Nagvenkar,
2. Smt. Rajeshri Shripad Nagvenkar,
both residing at Killan, Guirim,
Bardez, Goa. Applicants.

V/s.

Ramesh Mahadev Nagvenkar,
r/o. Killan, Guirim, Bardez, Goa. Respondent.

Mr. E.P. Lobo, Advocate for the applicants.

Mr. J.P. Mulgaonkar, Advocate for the respondent.

CORAM : A.S. AGUIAR, J

DATE : MARCH 7, 2002.

ORAL ORDER :

Heard the learned Advocates. This application seeks revision of the order dated 1.9.2001 passed by the Civil Judge, Sr. Division, at Mapusa in Special Civil Suit No.495/1986 allowing the plaintiffs to withdraw the suit unconditionally and rejecting the application of the defendants for transposing themselves as plaintiffs in the said suit. By the impugned order, the application for withdrawal dated 7.8.2001 under Order 23 C.P.C. has been allowed unconditionally and the application dated 16.8.2001 of the defendants under Order 23, Rule 1A read with Order 1, Rule 10 C.P.C. rejected.

2. Learned Advocate for the applicants contends that the plaintiffs/respondents could not be allowed to withdraw the suit unconditionally as the application made by the plaintiffs was under Order 23, Rule 3 and not under Order 23, Rule 1. The plaintiffs by the said application not only prayed for permission to withdraw the suit, but also sought liberty to institute a fresh suit in respect of the said claim. He further contends that his application for transposition ought to have been allowed and in support thereof he relies upon the decision in the case of Smt. Gowramma v. Nanjappa and ors. (AIR 2002 Karnataka 76) - Head Note (D) wherein the Court observed that in a suit for partition of joint family properties claimed by one defendant for partition and separate possession of her share taken in written statement by paying necessary court fee and subsequent memo by plaintiff and some other defendants for withdrawal of suit on ground of settlement of dispute out of Court, the order of Court dismissing the suit as settled out of Court, is not proper and the defendant claiming partition should be permitted to continue the suit by transposing herself as plaintiff. Reference is made in the said Judgment to the case of Ajita Debi v. Hossendra Begum, reported in A.I.R. 1977 Cal. 59 wherein the Calcutta High Court reiterated the following principle :

" In our view, where an application has been made under Order XXIII, Rule 1, the plaintiff is entitled to withdraw his suit and the defendants cannot be heard to oppose such prayer. But the said legal right of the plaintiffs to withdraw the suit is not unconditional or absolute. The Court can only exercise its jurisdiction in favour of the plaintiffs where the interests of the defendants are not adversely affected in any way if the plaintiffs are allowed to withdraw the suit. To illustrate, in a partition suit by a sole plaintiff against defendants, the former can not be allowed to withdraw the suit inasmuch as a defendant having a cause of action against such plaintiff, may be allowed to be transposed as plaintiff in the suit...."

"Where an application simpliciter has been made under Order 23, Rule 1, the Court cannot compel the plaintiff to proceed with the suit and the defendants cannot be allowed to complain against such order. But where there is an affinity or identity of interests between the plaintiffs and one or more of the defendants, the plaintiffs cannot be allowed to withdraw or to compromise the suit with one

of the defendants if an application on behalf of other defendants having an interest in the suit is made for their transposition to the category of plaintiffs and for transposition of the plaintiffs to the category of the defendants under Order 1, Rule 10."

Reference is also made to the case of Manohar Singh v. Sardar Bai (AIR 1987 Rajasthan 177), wherein the learned Single Judge of Rajasthan High Court held:

" that in a suit for partition, even the defendants have the same right as plaintiff to claim partition and the manner in which the parties are arrayed as plaintiffs or defendants in the suit, is not material and the defendants can continue the suit if they feel that the plaintiff is not continuing the suit in their interest and therefore, in a suit for partition, the plaintiff has no absolute right to withdraw a suit under Order 23, Rule 1 of the Code of Civil Procedure."

3. In the case of Gowramma V. Nanjappa and others (supra), the learned Judges of the Karnataka High Court laid down the procedure to be followed by the Court in a partition suit. In para (16), sub-para (iv), the

Court laid down :

"(iv) Even if no defendant has sought the relief of partition and separate possession till then, the Court may in appropriate cases permit any defendant who files an application in that behalf to get himself transposed as plaintiff and claim partition and separate possession by paying necessary Court Fee and continue the suit. Refusal to grant such permission should be for valid reasons to be assigned by the Court."

4. Learned Advocate on behalf of the respondent supports the impugned order contending that the application being one under Order XXIII, Rule 1 confers absolute right on the plaintiffs/respondents to withdraw the suit and further that the Court has rightly rejected the application of the applicants for transposition as plaintiffs, as from the defence taken by the applicants/defendants it is clear that the defendants are not claiming any partition of the properties, but claiming the said properties as sole and exclusive owners. In his defence, defendant No.1 has claimed that plaintiff No.1 was not his mother and plaintiff No.2 was not his brother and that he was the sole surviving heir of his father and hence the properties are of his sole and exclusive

ownership. Reliance is placed by the learned Advocate on the case of K.S. Bhoopathy and others v. Kokila and others. ((2000) 5 SCCs. 458) wherein the Apex Court has held as follows :

" 12. The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts:

(a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the Court; in that case he will be precluded from suing again on the same cause of action. Neither can the plaintiff abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and

(b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted by the court enables the plaintiff to avoid the bar in Order II Rule 2 and Section 11 CPC."

5. Further, it is contended by learned Advocate for the respondents that the defendants who claim to be transposed, must have interest identical to the interest of the plaintiff. In the case of *Gowramma v. Nanjappa and others* (supra) relied upon by the applicants, the Court has, in para (16), sub-para (iv), observed that "Refusal to grant such permission should be for valid reasons to be assigned by the Court". In the present case, trial Court while passing the impugned order, has set out reasons for refusing to allow transposition of the defendant as plaintiff and has relied upon the decision in *Jethiben v. Maniben and another* (AIR 1983 Gujarat 194) wherein it is observed that the defendant who claims to be transposed must have interest identical with the interest of the plaintiff or that where the plaintiff filed a suit who has interest in common to the person whom he makes proforma defendant and in collusion with contesting defendant decides to withdraw the suit, the said proforma defendant who has an identical interest with the plaintiff, be transposed as plaintiff, so that the suit filed by the plaintiff can be effectively proceeded against the defendant who has remained on record as defendant. It is further observed that the Court would not permit transposition just to give a chance to a litigant to avoid filing a suit or permit him to take advantage of the suit filed by his adversary against him claiming a relief against him by becoming a

plaintiff and trying to bring out the averments and reliefs which are contrary to those claimed by original plaintiff. The trial Court has held that the interest of the parties in the suit is also not identical to the reliefs sought in the plaint by the plaintiff No.1 who claims half share and plaintiff No.2 claims 1/4th share; whereas the defendants claim the entire property, and, therefore, on this ground transposition of defendant as plaintiff would not help the defendants to prove their case.

6. It is clear that the defence of the applicants in the suit for partition is one of exclusive ownership over the properties. Hence there was no identity of interest in the suit between the plaintiff and the defendants/ applicants warranting defendant's transposition as plaintiff in the suit.

7. In the circumstances, the trial Judge was justified in passing the impugned order. I see no reason to interfere with the same. Hence, the revision application rejected and disposed of.

(A.S. AGUIAR)
JUDGE

ssm